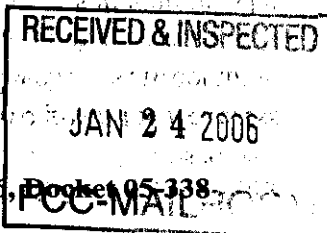


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Comments of Michael C. Worsham on FCC NPRM FCC-05-206, Docket 05-338

The following comments are in response to the FCC's request for comments on issues related to unsolicited fax ads and their allowance under a new provision of the Telephone Consumer Protection Act (TCPA) enacted July 9, 2005 when an "established business relationship" (EBR) exists between the sender and recipient. Because the EBR concept will likely impact existing provisions for EBR for telemarketing calls, these comments reflect the concern for calls as well.

1. An EBR should be limited to 3 months/1 month or at most 12 months /1 month.

The FCC could enact the same 18 month/3 month time period for the duration of an EBR for faxes that already exists under the FCC's rules for telephone calls. Alternatively, however, a shorter period which more realistically reflects the actual expectations of consumers should be enacted. If an EBR period for faxes has to exist, I believe 3 months/1 month is appropriate.

However, the FCC may wish to harmonize the EBR periods for faxes with the existing 18 month/3 month period for telemarketing calls. Thus, my fall back proposal would be a 12 month (1 year) EBR period for purchases, and a 1 month (or 30 day) period for inquiries, which would apply to both fax ads and telemarketing calls. The average person does not expect to be sent unsolicited fax ads, or receive pre-recorded voice solicitation calls, up to 3 months after they merely purchased a newspaper, or a can of soda, from a convenience store.

2. EBR should be express to the entity claiming or invoking it

The existence of an EBR should be created specific to the entity claiming it. For example, an application or expression of interest by a consumer made on an unidentified or undisclosed web site does not create an EBR with any entity, since the person could not have given their express intent to create an EBR to an unidentified or undisclosed entity. Undisclosed web sites are common in the mortgage industry, such as via links in unsolicited spam email which promise great rates - which themselves do not disclose the mortgage entity responsible for the email solicitation. The undisclosed entity can still communicate with the applicant using the information provided by the applicant, but just can't contact the person through fax ads (or pre-recorded voice calls).

This would help stop the fax (or call) first and then find (or create) a defense later practices of an increasing number of businesses. TCPA defendants in suits I have brought for clients have tried to claim an EBR existed based on some dubious or unsupported/undocumented alleged visit to a web site at some time in the distant past that is unknown to the consumer (or plaintiff). It appears arguments are even being made that a web inquiry by a consumer to a separate company (B) that the defendant company (A) does business with creates an EBR with company A as well as B.

3. An EBR is not created by visiting a web site.

The FCC should state unequivocally that merely visiting any web site, even one with a clear and unambiguous identification of the owner/host of the site, does not create an EBR for faxes or telemarketing calls.

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The whole point of advertising is of course to get one's name out there and visible. Thus legitimate faxers should be welcome the opportunity to advertise not just their product or service, but their name, and contact information.

To help enforce the FCC's rules, the FCC should use this rule making to clarify that failure to identify the sender of a fax or to otherwise violate 47 C.F.R. § 68.318 is an actionable violation which a private litigant may enforce pursuant to the TCPA, 47 U.S.C. § 227(b)(3).

8. A Do Not Fax policy should be available on demand, with minimum FCC requirements including date of creation and the person authorizing it

Similar to the FCC's rules for telemarketing, entities engaged in fax broadcasting should be required to produce on demand a copy of their Do Not Fax (DNF) policy. The FCC should specify a few minimal requirements establishing the content of such a policy. The date the policy was created, or last amended, and the full name of the person authorizing the policy should be included among the requirements. This will help prevent bogus and/or non-compliant policies of dubious origin from being created only when a consumer first asks for the policy. For any entity that faxes for more than one business client, the policy should clearly identify what businesses the policy applies to.

9. Do not fax requests should override EBRs and be honored immediately and permanently

A do not fax (DNF) request should take precedence over the creation of an EBR between to parties. Most fax broadcasters already do or can do this, and my experience is that once they get word of an actual or imminent lawsuit, they remove the complainant's fax number from their database right away.

Secondly, the DNF request should take effect immediately, and remain in effect until the consumer affirmatively and clearly removes or negates the request.

10. EBR compliance by common carriers should be monitored by the FCC.

While perhaps outside the scope of this rule, I wish to raise for the FCC the issue of common carrier involvement with unsolicited faxing. My experience is more often than not, a junk faxer uses a telecommunications reseller, so that the underlying major carrier does not have the first hand happenstance to observe or monitor the very large number of fax communications going through their system. It is also my experience that the major carriers do often get complaints about the more prolific junk faxers. However, despite becoming aware that their network is being used for improper purposes, they continue to allow it. "It" here means allowing the illegal activity of faxes being sent without either prior express permission or an EBR. The FCC should consider means or measures or requirements to get the common carriers to if not police the illegal activity, at least stop it when it is or should become known to the common carrier.

- End comments of Michael C. Worsham, submitted January 19, 2006 -